

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

VANCE MARCEL GIBSON,	)	
	)	
Petitioner,	)	
	)	1:18CV259
v.	)	6:93CR211-1
	)	
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER AND RECOMMENDATION  
OF UNITED STATES MAGISTRATE JUDGE

Petitioner, a federal prisoner, submitted a Motion to Vacate, Set Aside, or Correct Sentence [Doc. #334] pursuant to 28 U.S.C. § 2255 challenging the Judgment [Doc. #327] revoking his term of supervised release. This Motion cannot be further processed for the following reason:

1. Petitioner already has a direct appeal pending in the United States Court of Appeals for the Fourth Circuit. While there may be no jurisdictional problem with a motion under § 2255 proceeding at the same time as a direct appeal, the Advisory Committee Note to Rule 5 of the Rules Governing Section 2255 Proceedings states that it is “inappropriate” to simultaneously maintain a direct appeal and a motion under § 2255. Where a prisoner files such a motion while a direct appeal is pending, the normal practice is to dismiss the § 2255 motion without prejudice to it being refiled once the direct appeal process has ended. See, e.g., Capaldi v. Pontesso, 135 F.3d 1122 (6th Cir. 1998); United States v. Deeb, 944 F.2d 545 (9th Cir. 1991).

Because of this pleading failure, this particular Motion will be dismissed, but without prejudice to Petitioner promptly filing a new motion properly following the 28 U.S.C. § 2255 forms and correcting the defect of the present Motion after the end of his

direct appeal. To further aid Petitioner, the Clerk is instructed to send Petitioner new § 2255 forms and instructions for filing a § 2255 motion, which Petitioner should follow after the conclusion of his direct appeal.

IT IS THEREFORE ORDERED that the Clerk is instructed to send Petitioner § 2255 forms and instructions.

IT IS THEREFORE RECOMMENDED that this action be filed and dismissed *sua sponte* without prejudice to Petitioner promptly filing a corrected motion on the proper § 2255 forms after the conclusion of his direct appeal.

This, the 30th day of April, 2018.

/s/ Joi Elizabeth Peake  
United States Magistrate Judge